FILED
06-15-07
04:59 PM

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	R.06-10-005

REPLY COMMENTS

OF SUREWEST TELEVIDEO (U 6324 C)

ON PHASE II ISSUES

E. Garth Black
Mark P. Schreiber
Sean P. Beatty
Patrick M. Rosvall
COOPER, WHITE & COOPER LLP
201 California Street, 17th Floor
San Francisco, California 94111
Telephone: (415) 433-1900
Facsimile: (415) 433-5530

Attorneys for SureWest TeleVideo

June 15, 2007

I. INTRODUCTION.

Pursuant to the Assigned Commissioner's Ruling dated May 7, 2007 ("ACR"), SureWest TeleVideo ("STV") submits these reply comments in response to parties' opening comments on Phase II issues addressing implementation of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA") filed on May 31, 2007.[1]

STV disagrees with those parties that suggest that smaller providers should be held to the same build-out standards imposed on larger providers with over 1,000,000 telephone subscribers. STV and other providers with smaller local exchange carrier ("LEC") affiliates lobbied extensively for legislation that would give them greater flexibility relative to video build-out requirements. Any rules adopted to implement California Public Utilities Code Section 5890(c) must reflect the Legislature's intent to create less stringent build-out requirements for smaller providers.

Some parties have proposed substantial new reporting requirements in their opening comments. In its opening comments, STV opposed any reporting requirements beyond those specifically mandated in DIVCA. STV does not repeat its arguments in these reply comments, but reiterates its opposition to the adoption of new reporting requirements beyond those specifically identified in DIVCA.

STV agrees with AT&T's proposal to update General Order 169 to reflect notice requirements triggered by the imminent entry of a provider into a particular market.

II. THE COMMISSION SHOULD REJECT PROPOSALS TO APPLY THE SAME BUILD-OUT STANDARDS TO LARGER AND SMALLER PROVIDERS.

Instead of applying concrete build-out standards to smaller providers as it did for larger providers, AB 2987 adopted a more relaxed approach. Specifically, smaller providers are only required to build facilities within a reasonable time and are not required to build at all in geographic areas where "the cost to provide video service is substantially above the average cost

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[1] STV received opening comments from AT&T California ("AT&T"), California Cable and Telecommunications Association ("CCTA"), California Community Technology Policy Group et al. ("CCTPG"), the Division of Ratepayer Advocates ("DRA"), the Greenling Institute ("Greenlining"), the Small LECs, and Verizon.

of providing video service in that telephone service area."[2] This statutory approach reflects the difficulty in applying a uniform set of standards to a varied group of smaller providers. In the small ILEC community, service areas are dramatically dissimilar, ranging from the mountains to the Central Valley. These service areas naturally present different issues to tackle, and the fact that these companies are smaller means that their access to capital is much more limited than that of an AT&T or a Verizon. Given these considerations and the flexibility embodied in Section 5890(c), STV advocated in opening comments that the Commission should adopt safe harbors for build-out that would provide smaller operators the ability to avoid questions about their pace of build-out while they strive to meet the requirements imposed on them by Section 5890(c). Establishing safe harbors for smaller providers will provide added certainty to those who choose to meet them and will minimize the potential for additional Commission proceedings investigating compliance with Section 5890(c).

In contrast, several commenting parties representing consumer groups contend that build-out requirements applicable to larger providers should apply equally to smaller providers.[3] As discussed above, applying a one-size-fits-all approach to build-out requirements ignores legislative intent that smaller providers should not be subject to the same build-out requirements applied to larger carriers. Such intent is consistent with the fact that build-out standards reflected in Section 5890(e) were negotiated specifically for each of AT&T and Verizon. As the Senate Floor Analysis for AB 2987 confirms:

> The authors have negotiated buildout commitments from each of the two largest telecommunications companies. Those commitments, 25 percent of customers offered video service within two years, and 40 percent within five years for Verizon, and 35 percent within three years and 50 percent within five years for AT&T, reflect the different technology and installation hurdles faced by each company. While well short of 100 percent, these requirements are far more than either company has agreed to in any other state.[4]

The legislature was clearly concerned that imposing overly rigorous build-out requirements for the two largest companies could jeopardize video competition in California. Applying to smaller

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[2] Cal. Public Util. Code § 5890(c).

[3] *See* CCTPG et al. Opening Comments, p. 3; Greenlining Opening Comments, p. 1.

[4] Senate Floor Analysis for AB 2987, August 28, 2006, p. 4.

providers standards that represent the most significant build-out commitments in the country by either AT&T or Verizon does not recognize the "different technology and installation hurdles" faced by smaller providers, the very factors that led the Legislature to adopt different standards for each of AT&T and Verizon. If the Legislature had intended that the same build-out standards should also apply to smaller providers, it simply would have included smaller providers in the Section 5890(b) and (e) requirements. Further, as the Legislature established different build-out standards for AT&T and Verizon, certainly different build-out standards are appropriate for the smaller providers. The proposals to apply to smaller providers the exact AB 2987 standards applicable to either AT&T or Verizon is inappropriate and not in keeping with DIVCA.

Beyond setting general build-out standards for smaller providers that are exactly the same as larger providers, DRA also urges the Commission to apply to smaller providers the Section 5890(b) standards for passing low-income households that apply only to larger providers.[5] In effect, DRA asks the Commission to ignore the law and apply standards to smaller providers that were only intended to apply to the larger providers. However, DIVCA establishes two build-out frameworks: one for providers with 1,000,000 or more telephone customers and another for those providers with less than 1,000,000 telephone customers. Larger providers have specific build-out requirements for service area coverage (Section 5890(e)) and low-income household coverage (Section 5890(b)). Smaller providers, in contrast, do not have these specific build-out benchmarks, but are required to build out in their telephone service areas within a reasonable time, subject to the caveat that they do not have to build out in areas where the cost to do so is high (Section 5890(c)). Simply stated, applying the stringent, larger provider build-out requirements to smaller providers is inconsistent with the law and legislative intent reflected in the statutory build-out framework.

CCTA also appears to contend that safe harbors identified in DIVCA for larger providers should apply equally to all incumbent LECs, regardless of size.[6] CCTA bases its argument on the assumption that the Legislature divided the video market into two halves: incumbent LECs and incumbent cable operators, or, as CCTA puts it, that DIVCA did not intend to create a third

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[5] *See* DRA Opening Comments, p. 2; *see also* Cal. Public Util. Code § 5890(b).

[6] *See* CCTA Opening Comments, pp. 5-6 (contending that standards in Section 5890(e) should apply to smaller ILECs).

tier of state franchise holders.[7] However, CCTA ignores the various versions of AB 2987 and what they tell us regarding the Legislature's intent. As recently as two weeks prior to its passage by both houses, AB 2987 explicitly treated separately "telephone service providers of last resort" and non-providers of last resort, both of which were subject to different standards than those that applied to providers with 1,000,000 telephone customers. Consistent with the plain meaning of the provisions of the as-adopted AB 2987, the fact that smaller ILEC providers were identified for distinct build-out requirements in earlier versions of AB 2987 confirms that Section 5890(c) establishes distinct build-out requirements for smaller ILEC providers as compared to those build-out standards set forth in Sections 5890(b) and (e) for AT&T and Verizon.

Furthermore, to the extent CCTA's comments suggest that Section 5890(c) was actually intended to address incumbent cable operators,[8] this suggestion is completely unsupported. As even CCTA acknowledges, neither Section 5890(c), which applies to smaller providers, nor Section 5890(e), which applies to larger providers, impose any real build-out obligation on incumbent cable operators.[9] Both sections base build-out requirements on the assumption that a company offers voice first and follows with video. Because cable operators offer video first, any telephone customers they secure will per se have a video service available to them. Under these circumstances, incumbent cable operators will not, for the most part, be required to construct new facilities to comply with Section 5890(c). That means the only entities that are likely to experience new construction obligations if they secure state-issued franchises are smaller telephone companies. Accordingly, Section 5890(c) was not drafted to accommodate incumbent cable interests, but to address video build-out for smaller ILECs.

Any suggestion that new entrants into the video market must be held to the same build-out standards imposed on legacy, incumbent cable operators, which were usually the sole provider of wireline-based video services, should be disregarded. As a comparable parallel, STV

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[7] See CCTA Opening Comments, p. 2.

[8] *See* CCTA Opening Comments, p. 4 ("Thus the legislative requirements for state franchise holders with fewer than 1 million customers were deliberately designed to recognize that entities like incumbent cable operators had already complied with stringent build-out requirements for video service . . ..)

[9] *See* CCTA Opening Comments, p. 4 ("Since incumbent cable operators all had fewer than 1 million telephone customers, and first provided video service to all their customer, they *a prior* met this build-out requirement.").

notes that competitive local exchange carriers ("CLECs") were never required to build-out their networks to fully cover a designated service area, let alone to do so within a particular period of time. Imposing such requirements would have likely sabotaged the emerging market for competitive telecommunications services. Similar concerns should inform the Commission's decision-making on build-out requirements for smaller providers. If anything, the concerns are more significant, because at least in the CLEC context, the AT&T's and MCI's of the world had access to significant resources. Smaller providers have no such access to extensive resources and face the challenging task of not only constructing networks capable of providing video, but also convincing customers to change providers, all of which makes the investment in video infrastructure a very high-risk proposition.

Based on these considerations, the Commission should reject any suggestion that smaller providers should be subject to the same build-out requirements as larger providers. Instead, the Commission should permit smaller providers to build out their systems within a reasonable time as contemplated under Section 5890(c), but establish the following safe harbors outlined in STV's opening comments that, if met, would demonstrate per se that a smaller provider is on its way to building out its video system within a reasonable time:

Predominantly Fiber-Based Systems	
Four Years	25% of Households
Ten Years	40% of Households

Non-Fiber-Based Systems	
Six Years	35% of Households
Ten Years	50% of Households

STV's safe harbor proposal adheres to the intent of DIVCA and is not inconsistent with recommendations of other parties that would apply larger provider benchmarks to smaller providers. STV's proposal relies on the same large provider build-out thresholds measured on the basis of percentage of homes passed, but simply allows additional time for smaller providers who do not have the enormous financial resources of the larger providers to meet those standards. STV's proposal is reasonable as a safe harbor criteria with which to evaluate ongoing

DIVCA compliance. As also discussed in STV's opening comments, the Commission should not mandate these safe harbors for smaller providers, but should allow each individual smaller provider the opportunity to demonstrate that its build-out is occurring at a reasonable pace even if it has not met one of the safe harbors.

CCTPG et al. suggest that safe harbors would violate the public hearing requirement in DIVCA.[10] CCTPG et al. too narrowly construe DIVCA. DIVCA specifically reserves to the Commission the authority to determine what constitutes a reasonable time for build-out by smaller providers.[11] Accordingly, the Commission certainly has the discretion to establish reasonable-time safe harbors. If, however, those safe harbors are not met and either a local jurisdiction complains to the Commission or the Commission elects to open an investigation regarding compliance with Section 5890, STV does not disagree that Section 5890(g) would require such proceedings to include a public hearing.

Finally, smaller providers should not have to vet their build-out plans in advance through an application process to demonstrate prospective compliance with Section 5890(c), because the application process only requires a certification that a provider will comply with the non-discrimination requirements in Section 5890.[12] Instead, any allegations that a smaller provider has not complied with its Section 5890(a) and (c) obligations can be handled through the complaint/investigation process identified specifically in Appendix G to General Order 169 pertaining to "Investigations into Antidiscrimination and Build-Out Provisions."

To implement STV's proposals, the Commission should modify General Order 169, Section VI.B.1 by deleting subparagraph (3) and inserting language that subparagraphs (1) and (2) are not the only avenue for demonstrating compliance with Section 5890(c). The Commission could further note in that section that each individual provider bears the burden of demonstrating that its build-out is occurring within a reasonable time in the event a formal complaint case is filed or an Order Instituting Investigation is adopted by the Commission.

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[10] *See* CCTPG et al. Opening Comments, p. 3; *see also* Cal. Public Util. Code § 5890(g).

[11] Cal. Public Util. Code § 5840(c).

[12] Cal. Public Util. Code § 5840(e)(1)(B)(i).

III. THE COMMISSION SHOULD UPDATE GENERAL ORDER 169 TO REFLECT NOTICE REQUIREMENTS RELATED TO IMMINENT ENTRY.

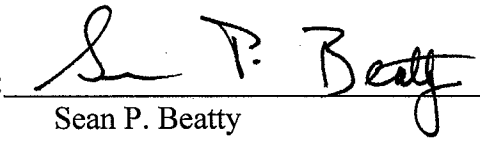
In its opening comments, AT&T notes that General Order 169 did not include the requirement identified in D.07-03-014 that state-franchised video providers provide notice to incumbent cable operators at the same time state-franchised video providers provide notice to a local jurisdiction that they intend to initiate service. Such notice is important to incumbent cable operators, because it provides the basis upon which an incumbent cable operator may exercise abrogation rights provided under Section 5840(o)(3). Because the General Order is much more likely to be a source of information than the decision adopting the General Order, the Commission should add a new paragraph to Section VI of General Order 169 identifying the obligation to provide notice to both local jurisdictions and incumbent cable operators when a state-franchised video provider intends to initiate service.

IV. CONCLUSION.

Based on the foregoing, the Commission should establish separate build-out safe harbors for smaller providers without making such safe harbors mandatory construction benchmarks. STV's safe harbor proposal is consistent with AB 2987 in that it simply provides additional time to smaller companies who lack substantial financial resources to meet the safe harbor build-out standards agreed to by the larger companies. Accordingly, STV's safe harbor proposal is reasonable and should be adopted for application to smaller providers. The Commission should reject proposals to adopt additional, new reporting requirements beyond those identified in DIVCA. None of the parties supporting such additional reporting requirements could identify statutory support for their proposals, and, therefore, additional reporting proposals should not be adopted. Finally, the Commission should update General Order 169 to include D.07-03-014's obligation for state-franchised video providers to provide notice to both local jurisdictions and incumbent cable operators upon its intent to initiate service in a particular local jurisdiction.

Dated this 15th day of June, 2007, at San Francisco, California.

E. Garth Black
Mark P. Schreiber
Sean P. Beatty
Patrick M. Rosvall
COOPER, WHITE & COOPER LLP
201 California Street, 17th Floor
San Francisco, CA 94111
Telephone: (415) 433-1900
Facsimile: (415) 433-5530

By: 

Sean P. Beatty
Attorneys for SureWest TeleVideo

CERTIFICATE OF SERVICE

I, Noel Gieleghem, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is COOPER, WHITE & COOPER LLP, 201 California Street, 17th Floor, San Francisco, CA 94111.

On June 15, 2007, I served the following REPLY COMMENTS OF SUREWEST TELEVIDEO (U 6324 C) ON PHASE II ISSUES by placing a true and correct copy thereof with the firm's mailing room personnel, for mailing in accordance with the firm's ordinary practices, addressed to the parties on the CPUC service list for Proceeding No. R. 06-10-005.

Copies were also hand delivered to Assigned ALJs Kotz and Sullivan and Assigned Commissioner Chong.

Copies were also served via e-mail on those parties on the service list who provided an e-mail address.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 2007, at San Francisco, California.

Noel Gieleghem

SERVICE LIST

CPUC Service List as of June 12, 2007
Proceeding No. R. 06-10-005

ALLEN S. HAMMOND, IV
PROFESSOR OF LAW
SANTA CLARA UNIVERSITY
SCHOOL OF LAW
500 EL CAMINO REAL
SANTA CLARA, CA 94305

ALOA STEVENS, DIRECTOR,
GOVERNMENT&EXTERNAL AFFAIRS
FRONTIER COMMUNICATIONS
PO BOX 708970
SANDY, UT 84070-8970

APRIL MULQUEEN
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ANDRES F. IRLANDO
VICE PRESIDENT
VERIZON CALIFORNIA, INC.
112 LAKEVIEW CANYON ROAD
THOUSAND OAKS, CA 91362

ANITA C. TAFF-RICE
ATTORNEY AT LAW
1547 PALOS VERDES MALL, SUITE 298
WALNUT CREEK, CA 94597

ANN JOHNSON
VERIZON
HQE02F61
600 HIDDEN RIDGE
IRVING, TX 75038

ANNE NEVILLE
CALIF PUBLIC UTILITIES COMMISSION
CARRIER BRANCH
AREA 3-E
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ALIK LEE
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS
& CONSUMER ISSUES BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BARRY FRASER
CITY OF SAN FRANCISCO
875 STEVENSON STREET, 5TH FLOOR
SAN FRANCISCO, CA 94103

WILLIAM HUGHES
ASSISTANT CITY ATTORNEY
CITY OF SAN JOSE
16TH FLOOR
200 EAST SANTA CLARA STREET
SAN JOSE, CA 95113-1900

BARRY F. MCCARTHY, ESQ.
ATTORNEY AT LAW
MCCARTHY & BARRY LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

BILL NUSBAUM
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

BOBAK ROSHAN, LEGAL ASSOCIATE
THE GREENLINING INSTITUTE
1918 UNIVERSITY STREET, 2ND FLOOR
BERKELEY, CA 94704

CHARLES BORN, MANAGER
GOVERNMENT & EXTERNAL AFFAIRS
FRONTIER COMMUNICATIONS OF
CALIFORNIA
9260 E. STOCKTON BLVD.
ELK GROVE, CA 95624

RICHARD CHABRAN
CALIFORNIA COMMUNITY
TECHNOLOGY POLICY
1000 ALAMEDA STREET, SUITE 240
LOS ANGELES, CA 90012

GERALD R. MILLER
CITY OF LONG BEACH
333 WEST OCEAN BLVD.
LONG BEACH, CA 90802

CYNTHIA J. KURTZ, CITY MANAGER
CITY OF PASADENA
117 E. COLORADO BLVD., 6TH FLOOR
PASADENA, CA 91105

CHRISTINE MAILLOUX
ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

DAVID HANKIN
VP, GOVERNMENT AFFAIRS
RCN CORPORATION
1400 FASHION ISLAND BLVD., SUITE 100
SAN MATEO, CA 94404

DAVID J. MILLER, ATTORNEY AT LAW
AT&T CALIFORNIA
525 MARKET STREET, ROOM 2018
SAN FRANCISCO, CA 94105

DAVID J. MILLER, ATTORNEY AT LAW
AT&T CALIFORNIA
525 MARKET STREET, ROOM 2018
SAN FRANCISCO, CA 94105

DELANEY HUNTER
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

DOUGLAS GARRETT
COX COMMUNICATIONS
2200 POWELL STREET, STE. 1035
EMERYVILLE, CA 94608

DAVID C. RODRIGUEZ
STRATEGIC COUNSEL
523 WEST SIXTH STREET, SUITE 1128
LOS ANGELES, CA 90014

EDWARD RANDOLPH, ASM LEVINE'S OFFICE
ASSEMBLY COMMITTEE/UTILITIES AND
COMMERC
STATE CAPITOL ROOM 5136
SACRAMENTO, CA 95814

ELAINE M. DUNCAN
ATTORNEY AT LAW
VERIZON
711 VAN NESS AVENUE, SUITE 300
SAN FRANCISCO, CA 94102

ENRIQUE GALLARDO
LATINO ISSUES FORUM
160 PINE STREET, SUITE 700
SAN FRANCISCO, CA 94111

ESTHER NORTHRUP
COX CALIFORNIA TELCOM, LLC
5159 FEDERAL BLVD.
SAN DIEGO, CA 92105

FASSIL FENIKILE
AT&T CALIFORNIA
525 MARKET STREET, ROOM 1925
SAN FRANCISCO, CA 94105

MICHAEL J. FRIEDMAN, VICE PRESIDENT
TELECOMMUNICATIONS
MANAGEMENT CORP.
5757 WILSHIRE BLVD., SUITE 635
LOS ANGELES, CA 90036

GREG R. GIERCZAK
EXECUTIVE DIRECTOR
SURE WEST TELEPHONE
PO BOX 969
200 VERNON STREET
ROSEVILLE, CA 95678

GREGORY T. DIAMOND
7901 LOWRY BLVD.
DENVER, CO 80230

GREG FUENTES
11041 SANTA MONICA BLVD., NO.629
LOS ANGELES, CA 90025

GRANT KOLLING
SENIOR ASSISTANT CITY ATTORNEY
CITY OF PALO ALTO
250 HAMILTON AVENUE, 8TH FLOOR
PALO ALTO, CA 94301

GLENN SEMOW, DIRECTOR
STATE REGULATORY & LEGAL AFFAIRS
CALIFORNIA CABLE &
TELECOMMNICATIONS
360 22ND STREET, NO. 750
OAKLAND, CA 94612

GREG STEPHANICICH
RICHARDS, WATSON & GERSHON
44 MONTGOMERY STREET, SUITE 3800
SAN FRANCISCO, CA 94104-4811

GRANT GUERRA
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO, CA 94120-7442

TIM HOLDEN
SIERRA NEVADA COMMUNICATIONS
PO BOX 281
STANDARD, CA 95373

IZETTA C.R. JACKSON
OFFICE OF THE CITY ATTORNEY
CITY OF OAKLAND
1 FRANK H. OGAWA PLAZA, 10TH FLR.
OAKLAND, CA 94612

MARGARET L. TOBIAS
TOBIAS LAW OFFICE
460 PENNSYLVANIA AVENUE
SAN FRANCISCO, CA 94107

JENNIE CHANDRA
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5141
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOSEPH WANZALA
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES
& PRICING BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOSE E. GUZMAN, JR.
NOSSAMAN GUTHNER KNOX
& ELLIOTT LLP
50 CALIFORNIA STREET, 34TH FLOOR
SAN FRANCISCO, CA 94111-4799

JANE WHANG
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5029
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOE CHICOINE, MANAGER
STATE GOVERNMENT AFFAIRS
FRONTIER COMMUNICATIONS
PO BOX 340
ELK GROVE, CA 95759

JEFFREY SINSHEIMER
CALIFORNIA CABLE &
TELECOMMUNICATIONS
360 22ND STREET, 750
OAKLAND, CA 94612

KATIE NELSON
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533

KELLY E. BOYD
NOSSAMAN,GUTHNER,KNOX AND ELLIOTT
915 L STREET, SUITE 1000
SACRAMENTO, CA 95814

KEN SIMMONS, ACTING GENERAL
MANAGER
INFORMATION TECHNOLOGY AGENCY
CITY HALL EAST, ROOM 1400
200 N. MAIN STREET
LOS ANGELES, CA 90012

KEVIN SAVILLE, ASSOCIATE GENERAL
COUNSEL
CITIZENS/FRONTIER COMMUNICATIONS
2378 WILSHIRE BLVD.
MOUND, MN 55364

STEVEN KOTZ
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW
JUDGES
ROOM 2251
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JONATHAN L. KRAMER, ATTORNEY AT LAW
KRAMER TELECOM LAW FIRM
2001 S. BARRINGTON AVE., SUITE 306
LOS ANGELES, CA 90025

ROBERT LEHMAN
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS & CONSUMER
ISSUES BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LONNIE ELDRIDGE, DEPUTY CITY
ATTORNEY
CITY ATTORNEY'S OFFICE
CITY HALL EAST, SUITE 700
200 N. MAIN STREET
LOS ANGELES, CA 90012

ALEXIS K. WODTKE, STAFF ATTORNEY
CONSUMER FEDERATION OF CALIFORNIA
520 S. EL CAMINO REAL, STE. 340
SAN MATEO, CA 94402

LESLA LEHTONEN, VP LEGAL &
REGULATORY AFFAIRS
CALIFORNIA CABLE TELEVISION
ASSOCIATION
360 22ND STREET, NO. 750
OAKLAND, CA 94612

MAGGLE HEALY
CITY OF REDONDO BEACH
415 DIAMOND STREET
REDONDO BEACH, CA 90277

MALCOLM YEUNG, STAFF ATTORNEY
ASIAN LAW CAUCUS
939 MARKET ST., SUITE 201
SAN FRANCISCO, CA 94103

MARK T. BOEHME
ASSISTANT CITY ATTORNEY
CITY OF CONCORD
1950 PARKSIDE DRIVE
CONCORD, CA 94510

MARK RUTLEDGE
TELECOMMUNICATIONS FELLOW
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, SECOND FLR.
BERKELEY, CA 94704

MICHAEL OCHOA
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS & CONSUMER
ISSUES BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MARIE C. MALLIETT
THE COMMUNICATIONS WORKERS OF
AMERICA
2870 GATEWAY OAKS DRIVE, SUITE 100
SACRAMENTO, CA 95833-3509

MARIA POLITZER
LEGAL DEPARTMENT ASSOCIATE
CALIFORNIA CABLE
TELEVISION ASSOCIATION
360 22ND STREET, NO. 750
OAKLAND, CA 94612

ROB WISHNER
CITY OF WALNUT
21201 LA PUENTE ROAD
WALNUT, CA 91789

AARON C. HARP
OFFICE OF THE CITY ATTORNEY
CITY OF NEWPORT BEACH
3300 NEWPORT BLVD
NEWPORT BEACH, CA 92658-8915

PETER A. CASCIATO
A PROFESSIONAL CORPORATION
355 BRYANT STREET, SUITE 410
SAN FRANCISCO, CA 94107

PETER DRAGOVICH
ASSISTANT TO THE CITY MANAGER
CITY OF CONCORD
1950 PARKSIDE DRIVE, MS 01/A
CONCORD, CA 94519

PHILIP KAMLARZ
CITY OF BERKELEY
2180 MILVIA STREET
BERKELEY, CA 94704

PATRICK WHITNELL
LEAGUE OF CALIFORNIA CITIES
1400 K STREET
SACRAMENTO, CA 95814

RANDY CHINN
SENATE ENERGY UTILITIES &
COMMUNICATIONS
STATE CAPITOL, ROOM 4040
SACRAMENTO, CA 95814

REGINA COSTA
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

RANDLOPH W. DEUTSCH
SIDLEY AUSTIN LLP
555 CALIFORNIA STREET, SUITE 2000
SAN FRANCISCO, CA 94104

RHONDA J. JOHNSON
VP-REGULATORY AFFAIRS
AT&T CALIFORNIA
525 MARKET STREET, ROOM 1923
SAN FRANCISCO, CA 94105

ROBERT GNAIZDA, POLICY
DIRECTOR/GENERAL COUNSEL
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, SECOND FLOOR
BERKELEY, CA 94704

ROY MORALES
CHIEF LEGISLATIVE ANALYST
CIYT OF LOS ANGELES
CITY HALL
200 N. SPRING STREET, 2ND FLOOR
LOS ANGELES, CA 90012

ROBERT A. RYAN
COUNTY COUNSEL
COUNTY OF SACRAMENTO
700 H STREET, SUITE 2650
SACRAMENTO, CA 95814

SINDY J. YUN
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

STEVEN LASTOMIRSKY
DEPUTY CITY ATTORNEY
CITY OF SAN DIEGO
1200 THIRD AVENUE, 11TH FLOOR
SAN DIEGO, CA 92101

SCOTT MCKOWN, C/O CONT OF MARIN ISTD
MARIN TELECOMMUNICATION AGENCY
371 BEL MARIN KEYS BOULEVARD
NOVATO, CA 94941

STEPHANIE CHEN, LEGAL ASSOCIATE
THE GREENLINING INSTITUTE
1918 UNIVERSITY STREET, 2ND FLOOR
BERKELEY, CA 94704

SUE BUSKE
THE BUSKE GROUP
3001 J STREET, SUITE 201
SACRAMENTO, CA 95816

SUSAN WILSON, DEPUTY CITY ATTORNEY
RIVERSIDE CITY ATTORNEY'S OFFICE
3900 MAIN STREET, 5TH FLOOR
RIVERSIDE, CA 92522

SYREETA GIBBS
AT&T CALIFORNIA
525 MARKET STREET, 19TH FLOOR
SAN FRANCISCO, CA 94105

THALIA N.C. GONZALEZ, LEGAL COUNSEL
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVE., 2ND FLOOR
BERKELEY, CA 94704

TRACEY L. HAUSE
ADMINISTRATIVE SERVICES DIRECTOR
CITY OF ARCADIA
240 W. HUNTINGTON DRIVE
ARCADIA, CA 91007

TOM SELHORST
AT&T CALIFORNIA
525 MARKET STREET, 2023
SAN FRANCISCO, CA 94105

TIMOTHY J. SULLIVAN
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5212
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

WILLIAM JOHNSTON
CALIF PUBLIC UTILITIES COMMISSION
PUBLIC & DECISION ANALYSIS BRANCH
AREA 3-F
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

WILLIAM IMPERIAL,
TELECOMMUNICATIONS REG. OFFICER
INFORMATION TECHNOLOGY AGENCY
CITY HALL EAST, ROOM 1255
200 N. MAIN STREET
LOS ANGELES, CA 90012

WILLIAM K. SANDERS
DEPUTY CITY ATTORNEY
OFFICE OF THE CITY ATTORNEY
1 DR. CARLTON B. GOODLETT PLACE
ROOM 234
SAN FRANCISCO, CA 94102-4682

WILLIAM H. WEBER
ATTORNEY AT LAW
CBEYOND COMMUNICATIONS
320 INTERSTATE NORTH PARKWAY
ATLANTA, GA 30339

WILLIAM L. LOWERY
MILLER & VAN EATON, LLP
400 MONTGOMERY ST., SUITE 501
SAN FRANCISCO, CA 94103

WILLIAM L. LOWERY
MILLER & VAN EATON, LLP
580 CALIFORNIA STREET, SUITE 1600
SAN FRANCISCO, CA 94104